SUPREME COURT, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ZARKO ILIC,

Petitioner,

vs.

LIQUID AIR CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED

I. Did district court abused its discretion and engaged in a post hoc reasoning, two years after the trial, concluding that this case is "unreasonable and without foundation" awarding fees and costs in conflicts with *Christiansburg Garment Co. v. EEOC*. 434 U.S. 412, 98 S.Ct. 694 (1978); *Sullivan v. School Board of Pinellas County*. 773 F.2d 1182, 1189 (1985) and *Farmer v. American Arabian Oil Co.*, 379 U.S. 227, 235 (1964)?

II. Where attorneys are involved in a scheme to defraud and the magistrate and other judges in cover-up and double standard does that entitle Ilic to a new trial under the rule 60(b)(3)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. The district court abused its discretion and engaged in a post hoc reasoning, two years after the trial, concluding that this case is "unreasonable and without foundation" awarding fees and costs in conflicts with *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694 (1978); *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1189 (1985) and *Farmer v. American Arabian Oil Co.*, 379 U.S. 227, 235 (1964). . .10

A. Liquid Air should not be awarded attorney's fees and costs because this action was not unreasonable or without foundation. 11

1. Plaintiff estabiliched a prima facie case. 13

a) Discrimination 13

b) Retaliation 14

Page

(i) direct evidence 15

(ii) circumstantial evidence 15

2. Numerous settlement offers were exchanged. 18

3. The claim went to trial on its merits . .21

B. Costs 22

a) Zarko Ilic's deposition 24

II. Where attorneys are involved in a scheme to defraud and the magistrate and other judges in cover-up and double standard does entitle Ilic to a new trial under the rule 60(b)(3). 25

CONCLUSION 29

TABLE OF CITATIONS

Cases Cited:

Caban-Wheeler v. Elsea
904 F.2d 1549 (11th Cir. 1990) 18, 27

Christiansburg Garment Co. v. EEOC
434 U.S. 421, 98 S.Ct. 694 (1978) . . . . . i, 11

EEOC v. Kimbrough Investment Co.
703 F.2d 98 (5th Cir. 1983) 12

EEOC v. Reichhold Chemicals, Inc.
988 F.2d 1564 (11th Cir. 1993) 16

Farmer v. American Arabian Oil Co.
379 U.S. 227 (1964) . . . . . i, 11, 23

George R. Hall Inc. v. Superior Trucking Co. Inc.
532 F.Supp. 985 (N.D. Ga. 1982) 24

Page

Gillam v. A. Shyman, Inc.
31 F.R.D. 271 (D. Alaska 1962) 24

Great Coastal Express, Inc. v. International
Brotherhood of Teamsters, etc.
(1980, ED Va) 86 FRD 131, 110 BNA LRRM 2052 . 28

H. K. Porter Co. v. Goodyear Tire & Rubber Co.
(1976, CA6 Ohio) 536 F.2d 1115 26

Kupferman v. Consolidated Research & Mfg. Corp.
(1972, CA2 NY) 459 F.2d 1072 26

Lewis v. Smith
731 F.2d 1535 (11th Cir. 1984) 14

Plemer v. Parsons-Gilbane
713 F.2d 1127 (5th Cir. 1983) 22

Simmons v. Camden County Bd. of Ed.
757 F.2d 1187 (11th Cir.) 16

Sullivan v. School Board of Pinellas County
773 F.2d 1182 (11th Cir. 1985) . . . . . .i, 11, 12

United States v. International Tel. & Tel. Corp.
(1972, DC Conn) 349 F.Supp 22 27

White v. South Park Independent School District
693 F.2d 1163 (5th Cir. 1982) 22

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1920(2) 23, 24

42 U.S.C. § 2000e-2 1

42 U.S.C. § 2000e-3 3

Page

Rule Cited:

Federal Rule of Civil Procedure 54 22

Federal Rule of Civil Procedure 59 22

Federal Rule of Civil Procedure 60(b)(3). 22

APPENDIX

Appendix A - November 19, 1996 Eleventh Circuit order affirming judgment 1a

Appendix B - Report and Recommendation filed October 10, 1995 . . . . . .12a

Appendix C - Report and Recommendation filed May 3, 1995 . . . . . .17a

Appendix D - Excerpts from Plaintiff's Exhibit No. 96 . . . . . 21a

Appendix E - Excerpts from Plaintiff's Exhibit No. 97 . . . . . .22a

Appendix F - Excerpts from Plaintiff's Exhibit No. 129 . . . . . 23a

Appendix G - Excerpts from Plaintiff's Exhibit No. 26 . . . . . 24a

Appendix H - Excerpts from Plaintiff's Exhibit No. 27 . . . . . 25a

Appendix I - Excerpts from trial testimony of Bruno Fraeyman page 313 line 2 . . . . . 25a

Appendix J - Excerpts from trial transcript page 752 line 22 . . . . . 26a

Page

Appendix K - Excerpts from trial transcript
page 678 line 14 . . . . . 26a

Appendix L - Excerpts from trial transcript
page 559 line 7 . . . . . 26a

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, unreported is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported Report and Commendation of the district court in this case are reproduced at 12a and 17a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on November 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. § 2000e-2 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3, provides in pertinent part:

(a) It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... to discriminate against any individual, ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, ...

STATEMENT OF THE CASE

Zarko Ilic was hired by Liquid Air on December 16, 1968. Liquid Air started discriminatory practices in 1987 and were called to their attention by Ilic in 1988. In January 1989, Ilic met with Liquid Air's vice president for discussion on these matters. In this meeting in January 1989, Ilic told Mr. Fraeyman if discrimination didn't stop he may seek outside help (EEOC), Mr. Fraeyman stated to Ilic "... if I do seek outside help I won't be part of their family." No denial or rebuttal to this testimony was offered by the Liquid Air at trial.

In June 1989, Allen Robert Mike was secretly promoted after being with Liquid Air only two years. In admission by Liquid Air: "... Liquid Air denies that information regarding an opening for a manager position was posted at the Plant in or about July 1989".

Ilic was in charge during manager's absence for total of four weeks in 1989 and received a letter which states: "Your knowledge of the process and dedication to duty....".

Up to this time, Ilic's work performance promted no criticism or reprimand from his manager or from any representative of the Liquid Air. On October 9, 1989, Liquid Air started to build a record against Ilic.

On January 8, 1990, Ilic was given reprimand for failing to make entry explaining overtime on one time sheet. Other employees not subject to a similar national origin failed to make entries explaining overtime on their time sheets but were never reprimanded. These individuals are: Richard Schmidt, 21 omissions on 13 timesheets; Herb Perkins, 28 omissions on 15 timesheets; Mark Eller, 2 omissions on 1 timesheet and Charles Thompson, 1 omission on 1 timesheet. These evidence show that Ilic was

treated differently than all others regarding disciplinary matters in relation to omissions on the employees' time sheets where the nature of overtime was to be submitted.

On March 2, 1990, plant manager John McGrew was terminated after an investigation while Ilic was terminated without an investigation (App. K, 26a).

On May 8, 1990, Ilic received reprimand, a direct evidence of discriminatory intent (App. G, 24a). Evidence clearly shows why Liquid Air was reprimanded by FDA (App. H, 25a). Ilic, Yugoslavian was blamed for something that was manager's responsibility (App. I, 25a).

Evidence shows that Ilic had 105 hours to 264 hours for other employee on an overtime list in May of 1990.

In July 1990, Michael Bostian was secretly promoted after being with Liquid Air only a year in Orlando plant In admission by Liquid Air: "... Liquid Air denies that information regarding an opening for a manager position was posted at the Plant in or about July 1990" Also, on February 3, 1989, Michael Bostian was terminated "After a full and complete investigation ..." and ten (10) days later he was reinstated while Ilic was terminated without an investigation (App. K, 26a).

In October 1990, Charles Thompson was secretly promoted after being with the Liquid Air only a year in Orlando plant. In admission by Liquid Air: "... Liquid Air denies that information regarding an opening for an assistant manager position was posted at the Plant in or about October 1990."

Only after this third promotion in little over a year did Ilic decided to challenge Liquid Air's promotional policy. On November 19, 1990, Ilic called Liquid Air's vice president and was told "that it was to late, decision was already made."

Eight (8) days later Ilic received 3 days off without pay in a setup by new assistant manager.

Ilic filed complaint on this layoff issue according with the Liquid Air's policy (three steps) and was stop at first step of this policy.

On December 21, 1990, Ilic received verbal answer to his complaint by Charles Thompson which state: "As far as Liquid Air is concern case is close and my advice to you is not to call anybody." During discovery Ilic found this letter which state: "I also spoke to Mr. Smith, who informed me that Ilic's layoff was a dead issue and that

there was no appeal."; " ..., that neither Mr. Smith or Mr. Fraeyman would discuss the issue with him and that if he called them that he would be terminated. That as far as Liquid Air was concerned, his layoff was a dead issue." With above statements, a direct evidence, Ilic was denied due process.

Ilic knew that filing a charge and prosecuting a lawsuit against an employer for discrimination is a momentous undertaking with many important personal and professional ramifications, and is not a step taken lightly. That is why Ilic wrote a letter in last attempt to clear his record by using company policies. Liquid Air admits "Liquid Air admits that Bruno Fraeyman ("Fraeyman") did not respond to Ilic's December 25, 1990 correspondence in writing." Also, testimony of Bruno Fraeyman state: "Q. Did you respond or answer that letter? A. No. I didn't think that it was necessary." With the statements made in the last two paragraphs the Liquid Air's complaint policy of three steps procedural detail is so ambiguous as to be meaningless.

Up to this point Ilic was hoping to resolve issues of patterned discriminatory practices without governmental prodding.

Testimony and documents show that only after all attempts failed by Ilic to correct discriminatory practices, that he filed charge with EEOC on March 10, 1991.

The Liquid Air received notice of discrimination within ten (10) days. Only two days later Charles Thompson wrote account of working conditions about Ilic dated March 22, 1991. This documentary direct evidence show that Liquid Air acted with a retaliatory intent. Testimony of Charles Thompson state: "A. Mr. Smith asked me to basically give, provide some general information on overtime and Mr. Ilic.", but in interrogatories on question: "Did Ernie Smith asked Charles Thompson to write memorandum marked as Plaintiff's Exhibit 146 at Charles Thompson deposition?" Defendant's answer was: "No." Also, Thompson's testimony state: "A. Yes. I was incorrect in my memo of March 22, 1991 ..." And it was gong to be a pattern of fabricated facts, falsified and forged documents to be used

as a pretext for termination. This latter was found during discovery in Ilic's personal file.

After Ilic initiated EEOC proceedings against his employer, Ilic's supervisor deliberately and intentionally engaged in retaliation. Testimony of Ilic who was asked: "... what do you think government will do for you, fire all of us and gave you job as a manager." No denial or rebuttal to his testimony was offered by Liquid Air at trial.

Testimony of Ilic show that Ilic was offered dangerous overtime in attempt to build Ilic's refused overtime and in same time other employees were not asked to do it. Ultimately, professionals were hired from outside to do the job requested of Ilic

At about this time a report has been made that Charles Thompson had falsified FDA records. Testimony of Ernie Smith: "Q. Well, did Richard Schmidt report to you that he believed that Charles Thompson had falsified FDA records? ... I didn't talk to Rick any further about it and did not look at any records to see if there was any falsification." This was about thirty (30) days before Ilic's termination.

After termination on June 27, 1991, plaintiff filed his complaint of retaliation with EEOC on July 1, 1991. A determination of dismissal in both cases and notice of the right to sue were issued on December 27, 1991. This case was filed with the United States District Court for the Middle District of Florida, Orlando Division on March 2, 1992. Amended Complaint filed on May 26, 1992.

Trial commenced without a jury before the Magistrate Judge, David A. Baker on July 12, 1993 and was concluded on July 15, 1993. Report and Recommendation was submitted to the District Judge, Anne C. Conway on August 24, 1993. Supplemental Report and Recommendation was submitted on September 15, 1993. Judgment was rendered in favor of the Defendant by Order of October 20, 1993 and a Notice of Appeal was filed on October 25, 1993. USCA number: 93-3332.

On November 17, 1994, the Court of Appeals affirmed District Court judgment. On February 14, 1995, Ilic filed a Petition for Writ of Certiorari to the United States Supreme Court. On March 13, 1995, 11th Cir. has denied Appellee's motion for attorney's fees of $35,846.50. On April 17, 1995, the Petition for a Writ of Certiorari No.

94-1376 was denied. On May 8, 1995, Ilic filed a Petition for Rehearing. On May 30, 1995 petition for rehearing was denied.

On May 3, 1995, Report and Recommendation was submitted by Magistrate granting attorney fees and costs to Defendant (App. C, 17a). Order adopting Report and Recommendation was rendered on June 22, 1995. Notice of Appeal was filed on July 3, 1995. USCA number: 95-2864. Judgment of USCA dismissing appeal for lack of jurisdiction rendered on October 10, 1995.

On October 10, 1995, Report and Recommendations of Magistrate was filed granting attorney's fees in amount of $3,618.10 and costs in amount of $6,381.90 (App. B, 12a). On January 23, 1996, Order was filed adopting report and recommendations. Notice of Appeal was filed on January 29, 1996. On November 19, 1996, USCA affirmed the order (App. A, 1a). USCA No. 96-2144.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ABUSED ITS DISCRETION AND ENGAGED IN A POST HOC

REASONING, TWO YEARS AFTER THE TRIAL, CONCLUDING THAT THIS CASE IS "UNREASONABLE AND WITHOUT FOUNDATION" AWARDING FEES AND COSTS IS IN CONFLICTS WITH *CHRISTIANSBURG GARMENT CO. V. EEOC*, 434 U.S. 412, 98 S.CT. 694 (1978); *SULLIVAN V. SCHOOL BOARD OF PINELLAS COUNTY*, 773 F.2d 1182, 1189 (1985) AND *FARMER V. AMERICAN ARABIAN OIL CO.*, 379 U.S. 227, 235 (1964).

A. Liquid Air should not be awarded attorney's fees and costs because this action was not unreasonable or without foundation.

The law in Title VII cases is clear; in order to obtain attorney's fees against the plaintiff in an employment claim, the claim must be frivolous, unreasonable, or without foundation, even though the action was not brought in subjective bad faith. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978). The court in Christiansburg also cautioned that:

> [I]n applying these criteria, it is important that a district court resist the understandable temptation to engage in post hoc reasoning concluding that, because a plaintiff did not ultimately prevail, his

> action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 421-22, 98 S.Ct. at 700-701. The mere fact that Zarko Ilic did not prevail in the claim does not deem the claim unreasonable and without foundation.

The Sullivan court clearly set forth factors to consider in determining whether a claim is frivolous and, thus, warrants the award of attorney's fees in Title VII litigation. Specifically, factors considered by the court include whether:

1. the plaintiff established a prima facie case;

2. the defendant offered to settle; and

3. the trial court dismissed the case prior to trial or held a full blown trial on the merits.

Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1189 (1985), citing EEOC v. Kimbrough Investment Co., 703 F.2d 98, 103 (5th Cir. 1983). In applying these

criteria to the particular facts of this case, it is clear that the Liquid Air cannot prevail.

- **1. Plaintiff established a prima facie case.**

(a) Discrimination

The Court's finding that state: "Ilic has not proven that he was qualified for the promotions in question and thus has not established a prima facie case of discrimination with regard to his failure to promote claim." is inconsistent with finding: "... although there is evidence from which a finder of fact could find a prima facie case to have been established, I find that the Plaintiff has not proven facts that satisfy the, ..." (App. J, 26a). This clearly shows that case is not unreasonable and without foundation.

Let us see these facts on the issue of the promotion:

Fact from the Liquid Air's letter to EEOC state: "As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions." (App. E, 22a).

Documentations show that Ilic was in charge during manager's absence for total of four weeks in 1989. Ilic then

received a letter which state: "You knowledge of the process and dedication to duty .., Thanks again for your cooperation."

Letter from vice president reads: "John McGrew, plant manager has a high opinion of him, he is knowledgeable on plant and computer, has been operator for 20 years and clearly deserve to do something else, for example become assistant plant Mgr or plant Mgr."

Also, testimony of vice president, Bruno Fraeyman, that Ilic was training new operators during his time.

And testimony of area manager Robert Ferguson alleged that he was asked to ask Mr. Ilic if he would be interested in a one-man plaint which is a manager position.

Ilic has proven that he was qualified for promotions in question and thus has established a prima facie case.

On promotion, in Lewis the situation was similar to the present case. In Lewis Court stated:

> The district court, in finding that the plaintiff was less qualified than those hired, failed to state what standard of proof was applied. Under most circumstances a remand for the district court to make further findings in accordance with law would be the appropriate action.

See Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984).

(b) Retaliation

(i) direct evidence

In January of 1989, during his attempt to negotiate difference in overtime distribution on same basis with other employees, Ilic was told by vice president Fraeyman that: " ... if I do seek outside help (EEOC) I won't be part of their family." Although Mr. Fraeyman testified, he made no attempt to deny or rebut this testimony.

Ilic was not cross-examined as to foregoing matter, and no effort was made by the Liquid Air to discredit him with regard to the truthfulness of his testimony concerning this statement. The trial Court in no way discredited Ilic's testimony in his closing remarks or the final order.

Therefore, the testimony of Mr. Ilic, unrebutted and unchallenged, is direct evidence that illegal consideration of filing charge with EEOC played a significant or substantial part in the discharge of Mr. Ilic.

(ii) circumstantial evidence

To establish a prima facie case of retaliation, the plaintiff must show (1) that he has engaged in statutorily protected activity, (2) that employer has taken an adverse employment action, and (3) a causal connection exist between the two.

The 11th Cir. has interpreted the causal link requirement broadly; a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated. Simmons v. Camden County Bd. of Ed., 757 F.2d 1187, 1189 (11th Cir.) cert. denied, 474 U.S. 981, 106 S.Ct. 385, 88 L.Ed.2d 338 (1985).

Also, this Court has held that:

> The plaintiff relied on this circumstantial evidence to establish a prima facie case. Admittedly, defendant's counsel presented convincing proof of non-discriminatory reasons for each of these measures and defeated her claims on the merits; the cumulative effect of these employment actions and their timing, however, was sufficient to meet the plaintiff's initial burden. Accordingly, the retaliation were not frivolous and the district court abused its discretion in awarding fees against the EEOC. ... The record does not support the decision to grant fees. Accordingly, the district court's order granting attorney's fees is REVERSED.

E.E.O.C. v. Reichhold Chemicals, Inc., 988 F.2d 1564 (11th Cir. 1993).

Five memos and two statements were written regarding Ilic which were placed in his personnel file in an attempt to support the termination of Ilic for insubordination and disruptive activity. Expert testimony of Gerald R. McMenamin, PhD, Forensic Linguistics, concluded that these five memos and two statements were

written by Charles Thompson, assistant manager who terminated Ilic. His testimony at trial state: "It's simply, let me say virtually impossible that you could have five people, five different writers, share this large a set of characteristics or even part of the set, even just the words and phrases, ..."

Also, was introduced testimony of another expert by Forensic Questioned Document Examiner.

From the fact that expert testimony concluded that five memos were written by Charles Thompson; fact that from the day one credibility of Charles Thompson was questioned by area manager B. A. Lucht; fact that a report has been made that Charles Thompson had falsified FDA records in testimony of Ernie Smith and the fact that Liquid Air can't produce originals, inference can be drawn that Charles Thompson falsified these documents.

Also, fact is that if Ilic win his case with EEOC, Charles Thompson stand to lose his position an that is why he falsified these documents. He had a **MOTIVE**.

The Court failed to address Ilic's contention that Thompson fabricated the memos and statements to support Ilic's termination. If the memos and statements were fabricated, this would provide pivotal evidence on the

issue of intent, and could very well affect the ultimate finding on the question of discrimination. Caban-Wheeler v. Elsea, 904 F.2d 1549 (11th Cir. 1990).

Also,

> Moreover, the court failed to address plaintiff's contention that her supervisor, Melba Hill, tried to create evidence of progressive discipline, by for instance, creating a memo dated July 6, 1984.

2. Numerous settlement offers were exchanged.

A second factor the courts have relied on to determine the merits of a claim revolves around the fact that the parties have conducted settlement negotiations during the course of litigation.

Ilic tried to avoid protracted litigation and acted in good faith but it was Liquid Air that acted in bad faith as seen below from the complete account of negotiations.

1. On July 6, 1992, Liquid Air has made an Offer of Judgment in the amount of $5,000.00.

2. On July 10, 1992, to avoid protracted litigation Ilic offered a settlement of $40,000.00 and reinstatement. It doesn't make any common sense that Liquid Air was willing to spend over $200,000.00 (allegedly) when they could settle for $40,000.00 or less.

3. On October 15, 1992, during scheduling conference on this issue was said: "THE COURT: Mr. Ilic, any comment? MR. ILIC: Yes. I am one hundred percent for arbitration, your Honor. I want to get off of my life this forever and get on with my life. I can not go on with my life because of this case and I move forward to go arbitration and settle the case. THE COURT: ... So, all those are possible. Mr. Chapman, Mr. Ilic has indicated that he doesn't think this thing necessarily has to go to trial."

4. On October 29, 1992, I filed Motion to Compel Mediation.

5. On November 9, 1992 in another attempt to avoid costly and protracted litigation I made a Demand for Judgment for $150,000.00 (total $358,214.00) and reinstatement. This amount was negotiable if Liquid Air was interested. Liquid Air never came back with any counter offer. Reason why I asked for so much right the way is because my investigation has shown that I have proof of falsification, fabrication and forgery. Also, during discovery new information was arriving daily.

6. On November 25, 1992, Order was issued that the mediation is to be scheduled and completed by December 31, 1992.

7. On January 19, 1993, I filed Motion to Compel Scheduling Mediation Date. It was obvious that Liquid Air's attorney was stalling and ignoring Court Order as seen from court appointed mediators "Response" to my "Motion", "Furthermore, the undersigned's secretary has advised that she had a conversation with defense counsel in which Mr. Rock indicated that he did not want to have the mediation prior to April, 1993 or March at the earliest."

8. On January 27, 1993, Order was issued that the mediation is to be scheduled and completed by February 28, 1993.

9. Finally, on February 19, 1993 a mediation conference was held. Liquid Air came in bad faith. Liquid Air was not set to talk but to continue distraction of a former employee. If I remember correctly I started with an offer of $120,000.00. Liquid Air never came back with any counter offer. This was not a mediation. I was going down and down until I came to $70,000.00 or $80,000.00 and still

no counter offer from Liquid Air. It was not a good faith effort by Liquid Air to stop this case from going to trial.

10. On July 16, 1993, I have applied for an advertised position for reemployment with Liquid Air. I opened the door so this law suit can stop and I can go on with my life. Liquid Air didn't have to pay me anything and they could have saved I figure over $80,000.00 in last three years. Liquid Air have chosen to continue their retaliation by denying me position and distraction of a former employee. To this day on my attempts for reemployment Liquid Air's answer is because of: "... documentation in your personnel file, you are not eligible for rehire." This is continued retaliation.

Clearly, Ilic engaged in good faith negotiations.

3. The claim went to the trial on its merits.

Finally, the third factor to consider to determine of a claim was frivolous revolves around whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. It must be noted, again, that Liquid Air never filed Motion for Summary Judgment which would be denied because there were numerous issues of material facts at issue. Liquid Air's Motion for Judgment as a Matter of

Law at the close of the Ilic's evidence, formerly known as a Motion for Directed Verdict, was not granted; and the claim went on to be decided on the merits. The fact that the Ilic survived the above motion is evidence that the Ilic presented evidence to support its claim and that the claims brought were not unreasonable and without foundation.

The court, in its review of the record, should not attempt to engage in hindsight logic to determine the merits of the claim. In cases where a plaintiff introduced evidence sufficient to support its claims, findings of frivolity typically do not stand. White v. South Park Independent School District, 693 F.2d 1163 (5th Cir. 1982); Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983).

B. Costs

Zarko Ilic asserts that the Liquid Air is not entitled to certain costs recommended by the magistrate and affirmed by 11th Cir.

The purpose of the Rule 54, Fed. R. Civ. P., and the statutory allowance for cost, is not to impose upon a losing party all litigation costs and expenses which the prevailing party may have chosen to incur, or which it may have expended during the course of the litigation. To do so

would be to penalize the losing party by imposing unnecessary, burdensome, and/or extraordinary expenses incurred by the opposing side for activities or reasons other than those actually necessary to present the case at trial. In other words, simply because one party to the litigation expends substantial efforts, or incurs extraordinary expenses in developing the case for trial, or in measures and acts designed for their particular convenience or comfort level, or simply because the party over-prepares for the trial, the losing party shall not have to pay for such unrelated and unnecessary expenses.

The restraint a judge should use in characterizing a possible item as a taxable "cost" within one of the categories of Section 1920 was well described by Justice Black in the case of Farmer v. American Arabian Oil Co., 379 U.S. 227, 235 (1964).

> We do not read the [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigatant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, indeed if not anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore the discretion

> given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restraint in the administration of the rule is in harmony with our national policy in reducing insofar as possible the burdensome cost of litigation.

Zarko Ilic specifically objects to the following cost in the judgment.

a. Zarko Ilic's deposition

With respect to deposition, the cost of taking depositions is taxable if the depositions were "necessarily obtained for use in the case." 28 U.S.C. §1920(2). Conversely, cost incurred for the convenience of a party, for the purposes of investigation, or simply to aid a party in more thorough preparation of the case, are not recoverable. George R. Hall Inc. v. Superior Trucking Co. Inc., 532 F.Supp. 985, 994 (N.D. Ga. 1982). Costs for depositions are not taxable where witnesses are available for examination at trial, and costs are not allowed where depositions were not necessarily obtained for use at trial, but for convenience of counsel in preparing for trial and for discovery purposes. Gillam v. A. Shyman, Inc., 31 F.R.D. 271, 274 (D. Alaska 1962).

During scheduling conference this was said about this extra long unnecessary deposition: "MR. CHAPMAN:

I think we probably need four months, your Honor. We are at this point taking Mr. Ilic's deposition. That's been going on now for over a month. Not continuously obviously. THE COURT: I hope not." Also, present counsel stated that he would not have taken that long deposition.

Of over 800 pages at about 20,000 lines, counsel used only 34 lines. Also, this information was available because I have produced all job contacts to former counsel and all were copied. Also, former counsel obtained under Freedom of Information Act all work search records from Florida Department of Labor and Employment Security Division of Unemployment Compensation. My deposition was longer than trial transcript and unnecessary.

II.

WHERE ATTORNEYS ARE INVOLVED IN A SCHEME TO DEFRAUD AND THE MAGISTRATE AND OTHER JUDGES IN COVER-UP AND DOUBLE STANDARD DOES ENTITLE ILIC TO A NEW TRIAL UNDER THE RULE 60(b)(3).

The 11th Cir. has failed to address this issue under the rule 60(b)(3). Ilic appealed under rule 59 and 60(b)(3).

Pursuant to Federal Rules of Civil Procedure rule 60(b)(3) where fraud has been committed by attorneys upon court Plaintiff is entitled to relief from judgment under this rule.

While attorney should represent his client with singular loyalty, such loyalty does not demand that he act dishonestly or fraudulently; on contrary, attorney's loyalty to court, as officer thereof, demands integrity and honesty in dealing with court, and when he departs from such standard in conduct of case, he perpetrates fraud upon court. Kupferman v. Consolidated Research & Mfg. Corp. (1972, CA2 NY) 459 F2d 1072, 16 FR Serv 2d 160, 19 ALR Fed 747.

After report and testimony by expert witness attorney for Liquid Air with impunity introduces a photocopy as original in court. THE COURT: "Original document? MR. ROCK: Yes, sir."

Since attorneys are officers of court, their allegedly dishonest conduct involving misrepresentation and perjury would constitute fraud on court. H. K. Porter Co. v Goodyear Tire & Rubber Co. (1976, CA6 Ohio) 536 F2d 1115, 191 USPQ 481, 21 FR Serv 2d 1429.

Fabrication is a common dominator with attorneys for Liquid Air. (App. D-21a, E-22a and F-23a).

If attorney was implicated in fabrication of evidence by party, such implication could constitute fraud upon court. United States v International Tel. & Tel. Corp. (1972, DC Conn) 349 F Supp 22, 1972 CCH Trade Cases ¶ 74152, 16 FR Serv 2d 497, affd without op 410 US 919, 35 L Ed 2d 582, 93 S.Ct. 1363, 1973-1 CCH Trade Cases ¶ 74372.

This deliberately planned and carefully executed scheme to defraud was covered-up by the magistrate and also, magistrate himself was involved in fabrication of facts. (App. J, 26a). Liquid Air stated that "... Mr. Ilic was not promoted ... because he never indicated an interest in being promoted ..." (App. E, 22a) and not because he was not qualified as magistrate state. (App. J, 26a). Also, magistrate admitted that he was bias. (App. J, 26a).

The magistrate did not address the issue of whether Liquid Air fabricated facts and memos to support Ilic's suspension. In Cuban-Wheeler, supra. Judge Fay reversed and remanded but in Ilic's case Judge Fay find "no merit"

to proven fabrication. That is a double standard and in direct conflict with precedent of 11th circuit.

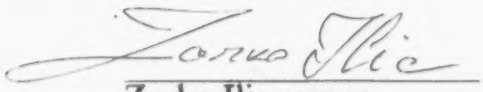
Ilic introduced during trial expert testimony of Gerald R. McMenamin, PhD, Forensic Linguistics, also, was introduced testimony of another expert by Forensic Questioned Document Examiner, Randall J. Hagge, other numerous witnesses and 133 (one hundred thirty three) Exhibits. For magistrate to say: "The "factual disputes" adverted to were primarily the result of Plaintiff's own assertions and personal characterization of events." (App. C, 19a) is judicial misconduct and/or judicial disability. One don't have to be a "rocket scientist" to see that something is wrong here.

Rule 60(b) recognizes court's inherent power to grant relief from judgment where court has been subjected to fraud and fraud upon court is matter which is so grave that relief is afforded without regard to any time limitation. Great Coastal Express, Inc. v International Brotherhood of Teamsters, etc. (1980, ED Va) 86 FRD 131, 110 BNA LRRM 2052.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Zarko Ilic, pro se
2500 Bay Leaf Drive
Orlando, Florida 32837
(407) 859-7479

APPENDIX A - NOVEMBER 19, 1996 ELEVENTH CIRCUIT ORDER AFFIRMING JUDGMENT

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-2144
Non-Argument Calendar
D. C. Docket No. 92-199-CIV-ORL-22

ZARKO ILIC,

Plaintiff-Appellant,

versus

LIQUID AIR CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(November 19, 1996)

Before DUBINA and BARKETT, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Zarko Ilic appeals the district court's order denying his motions for appointment of a grievance committee and a new trial, and awarding attorney's fees in his pro se Title VII employment discrimination suit. We affirm.

FACTS:

Ilic brought the underlying discrimination and retaliation action under Title VII of the Civil Rights Act of 1964 to correct alleged unlawful employment practices on the basis of religion, national origin, and retaliation. See 42 U.S.C. §§ 2000e-2(a), 2000e-3(a). The magistrate judge found that Ilic failed to make a prima facie case on any of his claims and recommended that the district court dismiss Ilic's action with prejudice. The district court adopted the magistrate's report and dismissed Ilic's action with prejudice. We affirmed, stating that "[t]here is simply no merit in any of the issues or contentions presented by Appellant [Ilic]." See also Ilic v. Liquid Air Corp., 41 F.3d 668 (11th Cir. 1994), cert. denied, 115 S.Ct. 1692 (1995).

Liquid Air Corporation (hereinafter "Liquid Air") sought attorney's fees and costs after trial. The magistrate found that Ilic's claims were unreasonable and without foundation, though not brought in subjective bad faith. He recommended that the district court grant Liquid Air's motion. The district court, over Ilic's objections, adopted the report and referred the case to the magistrate to determine the amount of the award.

In its motion and supporting affidavits, Liquid Air sought attorney's fees in the amount of $160,179.00 and costs in the amount of $6,493.73. At Ilic's request, the magistrate held a hearing in which Ilic testified about his financial condition and ability to pay. Based on this testimony, the magistrate found that Ilic had "a minimal ability to pay" Liquid Air's attorney's fees. Recognizing, however, that Ilic's claim was without foundation and holding that Ilic should bear some responsibility for pursuing such a claim, the magistrate recommended a reduced combined fee and cost award of $10,000 ($6,381.90 in costs and 3, 618.10 in attorney's fees). The district court, over Ilic's objections, adopted the report and awarded Liquid Air a combined fee and cost award of $10,000.

In addition, in two separate filings, Ilic moved the district court to grant him a new trial and to appoint a grievance committee. In his request to the district court to appoint a grievance committee, Ilic argued that Liquid Air's counsel engaged in misconduct or unprofessional behavior warranting an investigation. The district court denied these motions in the same order granting the award of costs and fees to Liquid Air.

DISCUSSION:

On appeal, Ilic argues that the district court erred in finding that his claims were unreasonable and without foundation. He also charges that the district court should have granted his motion for a new trial. Finally, Ilic argues that the magistrate should have recused himself.

Liquid Air responds that the district court applied the correct legal standard both in determining whether a fee award was proper and in determining the reasonableness and the amount of the award. In addition, Liquid Air argues that the rest of Ilic's claims on appeal are not properly before this Court.

Costs and attorney's fees

"[A] district court may award attorney's fees to a prevailing defendant in a Title VII case 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" Turner v. Sungard Business Systems, Inc., 91 F.3d 1418, 1422 (11th Cir. 1996) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). Factors considered important in determining whether to assess attorney's fees are: (1)

whether the plaintiff established a prima facie case, (2) whether the defendant offered to settle, and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. See Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985) (finding that plaintiff's claims were frivolous); see also Walker v. NationsBank of Florida N.A., 53 F.3d 1548, 1558-59 n.15 (11th Cir. 1995) (utilizing Sullivan factors in "without foundation" determination). "[A] plaintiff's claim should not be considered groundless or without foundation for the purpose of awarding fee to a prevailing defendant when the claims are meritorious enough to receive careful attention and review." Walker, 53 F.3d at 1559. In addition, Ilic's pro se status is not determinative for the purpose of awarding fees. See Nesmith v. Martin Marietta Aerospace, 833 F.2d 1489 (11th Cir. 1987) (awarding fees against pro se plaintiff in Title VII action). This Court reviews the district court's findings for abuse of discretion. Turner, 91 F.3d at 1422 (11th Cir. 1996).

Here, in the underlying discrimination and retaliation action, the district court found that Ilic did not make a prima facie case for any of his claims. We affirmed

this finding on appeal. Under the law of the case doctrine, this Court's findings of fact and conclusions of law made in a prior appeal of the same case are binding on Ilic. United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982). Robinson establishes three exceptions apply here. Further, in determining the propriety of the fee award, the magistrate concluded that Ilic's claims were "unreasonable and without foundation, though not brought in subjective bad faith." In addition, the magistrate noted that:

> [Ilic] also argues that the exchange of settlement offers and the absence of a motion for summary judgment militate against the award of fees. Under the circumstances of this case, neither of these factors is entitled to significant weight. A party in the position of [Liquid Air] here would reasonably offer some settlement simply in an effort to avoid the cost and bother of going to trial without regard to the merits of [Ilic's] claims. Given the 'factual issues' created by [Ilic's] version of events, a motion for summary judgment would be recognized as futile. Some cases, even without basis or merit, must be tried to be disposed of properly.

(R3-137 at 2). Moreover, the magistrate noted that Ilic's "suggestion that factual disputes existed does not mean that his case had a demonstrated foundation. The 'factual disputes' adverted to were primarily the result of [Ilic's] view of the termination of employment was not credited, and this Court has already determined that he did not

prove even a prima facie case of discrimination or retaliation." (Id.).

The record supports the magistrate's conclusions. In the underlying claim, this Court affirmed the district court's finding that "Ilic has not shown that his national origin or religion had anything to do with the way he was treated regarding the discipline he received[.]" In addition, this Court specifically held that "[t]here is simply no merit in any of the issues or contentions presented by Appellant [Ilic]." Thus, despite the fact that the magistrate held a four day hearing on the merits, this factor from Sullivan is not dispositive in this case. See Nesmith, 833 F.2d 1489 (awarding fees despite the fact that district court held a bench trial where plaintiff failed to make a prima facie case for any of his claims). Accordingly, the district court did not err in awarding fees and costs to Liquid Air on the facts of this case.

On appeal, Ilic also argues that the district court improperly awarded to Liquid Air the costs of transcribing the hearing and the taking of Ilic's deposition. Ilic properly objected to these costs before the district court. Significantly, apart from his argument that his claim was

reasonable and had foundation, he does not object to the court's award of attorney's fees to Liquid Air. Liquid Air responds that transcribing the hearing and the taking of Ilic's deposition were reasonably necessary for use in the case.

At the district court, Liquid Air sought fees of $160,179.00 and costs of $6,493.73. Liquid Air's proposed costs included the costs for transcribing the trial proceeding ($2,500.00), Ilic's deposition transcript ($3,881.90), and Supreme Court Brief printing (111.83). The district court did not award Liquid Air its printing costs, thus, Liquid Air's total cost award was for $6,381.90. In addition, the magistrate noted that because of Ilic's financial condition, a detailed analysis of Liquid Air's supporting documentation was unnecessary. The magistrate, noted that "in determining the size of the award, the district court should ascertain whether, in light of the Plaintiff's ability to pay, a reduced assessment would fulfill the deterrent purpose ... without subjecting the Plaintiff to financial ruin." (relying on Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911 (11th Cir. 1982)). Thus, the magistrate

recommended that Liquid Air receive a fee and cost award of $10,000.

a. Costs of transcribing the trial transcript

Ilic argues that the district court taxed him twice for the cost of transcribing the hearing because he already had to pay $394.50 to copy the transcript. This argument is meritless. Liquid Air incurred the cost of transcribing the hearing. Ilic needed a copy of the transcript for his appeal. He had to pay for his own copy as it was for his own benefit. Thus, the district court did not tax Ilic twice. In addition, 28 U.S.C. § 1920 expressly provides that a court can award the prevailing party with "[f]ees for the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case[.]" 28 U.S.C. § 1920(2). Here, the trial transcript was necessary for the proceedings in the underlying claim before this Court and the Supreme Court. See Ilic v. Liquid Air Corp., 41 F.3d 668 (11th Cir. 1994), cert. denied, 115 S.Ct. 1692 (1995).

b. Cost of taking Ilic's deposition

Ilic contends that Liquid Air did not take his deposition for use in the case. He argues that because Liquid Air used only a small portion of the deposition in

the hearing, the district court erred in awarding Liquid Air the costs of preparing the 800 page deposition. Liquid Air responds that the taking of Ilic's deposition was reasonably necessary for use in the case.

"In its discretion, the district court may award Rule 54(d) costs to a prevailing defendant, ..., in an employment discrimination action. The cost award may include the reporting fees for depositions that are reasonably necessary for use in the case, even though the depositions may not have been used at trial. 28 U.S.C.A. §1920(2). The district court has great latitude in determining whether an award of deposition costs is warranted." Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982) (internal citations omitted). A district court can properly award the prevailing party the costs of taking the depositions of the opposing party. Id.

Here, the district court awarded Liquid Air the cost of taking Ilic's deposition. Not only is Ilic the opposing party, but Liquid Air also specifically used the deposition in its cross examination of Ilic. Accordingly, the district court did not err in the awarding of $10,000.00 in fees and costs to Liquid Air.

New trial

In the same order in which the district court awarded Liquid Air fees and costs, the court also denied Ilic's motions for a new trial and the appointment of a grievance committee. Ilic contends that the district court's finding that his claim was "unreasonable and without foundation" is a "new judgment." Thus, Ilic argues that the district court erred in denying hes motion for a new trial. In addition, Ilic argues that Liquid Air's attorneys engaged in misconduct or unprofessional behavior warranting relief from the judgment in the underlying discrimination claim. Liquid Air responds that Ilic's request for a new trial is untimely and should be stricken.

The district court entered final judgment on the merits of Ilic's claims in October 1993. We affirmed on appeal. A party seeking a new trial under Federal Rule of Civil Procedure 59 must file the motion within 10 days of entry of judgment. See Fed.R.Civ.P. 59(b). Thus, Ilic's motion was untimely and the district court did not err in denying it.

Recusal of magistrate judge

Finally, Ilic contends that the magistrate judge "used double standards, personal bias, prejudice and stepped down from the bench to assume the role of advocate on the defendants' behalf." Although Ilic made the same arguments before the district court, Ilic has only appealed the district court's ruling regarding the award of fees and costs and denying his motions for a new trial and the appointment of a grievance committee (see R-4-184, 187). Thus, this issue is not properly before this Court.

AFFIRMED.

APPENDIX B - REPORT AND RECOMMENDATION FILED OCTOBER 10, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

-vs- 92-199-Civ-Orl-22

LIQUID AIR CORPORATION,

Defendant.

TO THE UNITED STATES DISTRICT COURT:

REPORT AND RECOMMENDATION

This cause came on for consideration with oral argument on the following motion filed herein:

MOTION: DEFENDANTS MOTION FOR DETERMINATION OF AMOUNT OF REASONABLE ATTORNEY'S FEES AND COSTS(#150)

FILED: July 14, 1995
THEREON it is RECOMMENDED that fees and costs be allowed in the total amount of $10,000.00.

This matter comes before the Court for determination of the amount of fees to be awarded to Defendant. The Court previously decided Defendant was entitled to an award of fees (Doc. No. 137 and 143). At Plaintiff's request a hearing was held at which Plaintiff testified regarding his financial condition.

It is unnecessary to restate the evidence and issues in this case. Suffice it to note that Plaintiff filed and tried a Title VII discrimination action against his former employer. He lost that suit, and judgment against him was affirmed on appeal. This Court has found that his action was without foundation, though not pursued vexatiously. Defendant filed voluminous material in support of its request for fees of $160,179.00 and costs of $6,493.73. Plaintiff maintains his objection to any award of fees and costs because he believes the Court erred in ruling against him and in finding that the claim was without foundation.

He has not challenged any specific item claimed by Defendant. Plaintiff supplied evidence of his financial condition in mitigation of the amount to be awarded.

COSTS

Under Rule 54, Fed.R.Civ.P., properly taxable costs are allowed as a matter of course to the prevailing party. Defendant seeks the cost of transcripts of the trial and of Plaintiff's deposition in the total amount of $6,381.90. These are allowable items that Defendant ought to be allowed to tax. The other item sought by Defendant is its printing cost in the Supreme Court. By rule, that cost is not taxable. Supreme Court Rules 43.3. Accordingly, it is respectfully recommended that Defendant be allowed costs of $6,381.90.

FEES

While Plaintiff has not objected to any specific aspect of Defendant's fee claim, he did offer evidence in mitigation based on his financial condition. *See Durett v. Jenkins Brickyard, Inc.*, 678 F.2d 911 (11th Cir. 1982).[1]

Plaintiff testified that he is employed slightly less than full time, earning $5.25 per hour. He and his wife jointly own a home worth approximately $120,000, that is

his only substantial asset. He has an unsecured debt of $40,000 that was incurred to pay off the balance of his mortgage. Plaintiff also has $3,000 in cash.

It thus appears that Plaintiff has at best a minimal ability to pay Defendant's attorney fees in this case.

The Eleventh Circuit has mandated that some consideration be given to a Plaintiff's financial condition in assuming the amount of fees to be awarded against him based on unfounded pursuit of litigation. *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 917 (11th Cir. 1982):

> in determining the size of the award, the district court should ascertain whether, in light of the Plaintiff's ability to pay, a reduced assessment would fulfill the deterrent purposes... without subjecting the Plaintiff to financial ruin.

The deterrent purpose of 42 U.S.C. § 1988 is to make plaintiffs responsible for the expense they cause defendants to incur in responding to unfounded litigation. Realization of that purpose requires that Plaintiff be held responsible for at least some of the consequences of his choice to pursue this litigation. *Durrett* suggests that a Plaintiff's responsibility should nonetheless be limited so as to avoid "financial ruin."

Plaintiff's claim here was without foundation; however, it was not pursued maliciously or in bad faith. In accordance with the *Durrett* mandate, the deterrent purpose is adequately served by a reduced fee award commensurate with Plaintiff's ability to pay.

Though Plaintiffs means are limited, he has some assets and income. It is therefore recommended that fees be allowed in the amount of $3,618.10, bringing Plaintiff's total liability for fees and costs to $10,000.00.

MOTION: DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO RULE 11 (#169)

FILED: September 12, 1995

THEREON it is respectfully RECOMMENDED that the motion be DENIED as superfluous in light of the foregoing award of fees and costs.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on October 10, 1995.

s/

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable Anne C. Conway
Zarko Ilic
Leo P. Rock, Jr.

APPENDIX C - REPORT AND RECOMMENDATION FILED MAY 3, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

-vs- Case No. 92-199-Civ-Orl-22

LIQUID AIR CORPORATION,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: DEFENDANTS MOTION TO REQUEST ATTORNEY'S FEES AND COSTS (#128)

FILED: February 27, 1995

THEREON it is RECOMMENDED that the motion is ruled on as follows.

Following issuance of the mandate of the Eleventh Circuit Court of Appeals affirming this Court's judgment dismissing Plaintiff's claims, Defendant filed the present motion renewing its request for an award of attorney fees. The basis for the request is 42 U.S.C. § 2000e(5)(k) as interpreted by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Under that standard, a prevailing Defendant in an employment discrimination case may recover its attorney fees if the employee's pursuit of his claims was "frivolous, unreasonable, or without foundation even though not brought in subjective bad faith."

Plaintiff's arguments in opposition to the motion, for the most part, attempt to reargue the merits of his claim. Even assuming Plaintiff is trying to show an arguable foundation for his claims rather than inappropriately trying to re-open the litigation, Plaintiff's arguments miss the mark. Plaintiff fails to recognize (or to accept) the numerous findings of fact and conclusions of law previously made adverse to his position. Those determinations are final, (Plaintiff has filed a Petition for Certiorari in the Supreme Court.) and the judgment has

been affirmed. Plaintiff's repeated assertions that various aspects of the Court's decision were wrong does little to show that his claims had a reasonable basis.

Likewise, Plaintiff's suggestion that factual disputes existed does not mean that his case had a demonstrated foundation. The "factual disputes" adverted to were primarily the result of Plaintiff's own assertions and personal characterization of events. Plaintiff's view of the termination of employment was not credited, and this Court has already determined that he did not prove even a prima facie case of discrimination or retaliation.

Plaintiff also argues that the exchange of settlement offers and the absence of a motion for summary judgment militate against an award of fees. Under the circumstances of this case, neither of these factors is entitled to significant weight. A party in the position of the Defendant here would reasonably offer some settlement simply in an effort to avoid the cost and bother of going to trial without regard to the merits of Plaintiff's claims. Given the "factual issues" created by Plaintiff's version of events, a motion for summary judgment would be recognized as futile. Some

cases, even without basis or merit, must be tried to be disposed of properly.

On the basis of the Findings of Fact and Conclusions of Law previously embodied in the judgment, Plaintiff's claims were unreasonable and without foundation, though not brought in subjective bad faith. In accordance with the *Christianburg Garment* standard, Defendant is entitled to an award of reasonable attorney fees, and it is respectfully recommended that its motion be **GRANTED**. It is further recommended that, should this Report and Recommendation be approved, the matter be referred to the United States Magistrate Judge for assessment of an appropriate fee award. See Rule 54(d)(2)(D), F.R.Civ.P.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on May 3, 1995.

s/

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Honorable Anne C. Conway
Zarko Ilic
Leo P. Rock, Jr.

APPENDIX D - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 96

KATTEN MUCHIN & ZAVIS

June 6, 1991

Mr. Robert K. Metaxa
Supervisory Investigator
Equal Employment Opportunity
Commission

... As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions.

On April 3, 1990, Ilic told several of his co-workers that he was carrying a gun. Ilic was advised on that same date that carrying or possessing a firearm on Company property or in a Company vehicle is a violation of Company policy and that he should cease from doing so.

Very truly yours,

Brian W. Bulger
Colette M. Foissotte

Attorneys for Liquid Air Corporation

APPENDIX E - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 97

KATTEN MUCHIN & ZAVIS

June 6, 1991

Mr. Robert K. Metaxa
Supervisory Investigator
Equal Employment Opportunity Commission

... Also, please be aware that Liquid Air considers this position statement confidential and does not consent to the use or admission of the statements made herein as evidence in any administrative or other proceeding.

... As set forth more fully below, Mr. Ilic was not promoted to the Manager or Assistant Manager positions referred to in his Charge because he never indicated an interest in being promoted to these positions.

In late March 1990, the Company discovered that Ilic was carrying a gun on his person while at work. Ilic was advised on April 3, 1990 that carrying or possessing a firearm on Company property or in a Company vehicle is a violation of Company policy and that a violation of this policy would result in immediate discharge.

Very truly yours,

s/
Brian W. Bulger
Colette M. Foissotte

Attorneys for Liquid Air Corporation

APPENDIX F - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 129

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ZARKO ILIC,

Plaintiff,

vs. CASE NO. 92-199-CIV-ORL-20

LIQUID AIR CORPORATION,

Defendant.

NOTICE OF SERVICE OF LIQUID AIR CORPORATION'S RESPONSES TO ZARKO ILIC'S SECOND INTERROGATORIES

... 10. In relation to the statement made by Brian W. Bulger and Colette M. Foissotte, Attorneys for Liquid Air Corporation, in a latter to EEOC on June, 1991, "In late March 1990, the Company discovered that Ilic was carrying a gun on his person while at work." Who was person that discovered gun on Zarko Ilic? Did that person search Zarko Ilic? Why Liquid Air did not terminate Zarko Ilic after that discovery?

ANSWER:

Liquid Air understands that one or more drivers have stated that Ilic was carrying a gun on his person while at work. Liquid Air does not know the identity of such driver or drivers and does not know if he or they searched Ilic. Liquid Air considered the circumstances and Ilic's statements and decided to call Ilic's attention to Liquid Air's long-standing firearms policy. After making a reasonable inquiry, Liquid Air has determined that the information known or readily obtainable by it is insufficient to enable Liquid Air to more fully respond to this Interrogatory.

APPENDIX G - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 26

LIQUID AIR
AN AIR LIQUIDE GROUP COMPANY

May 8, 1990

All of the mistakes discovered by the FDA were attributed to your omission of the required information on the required forms.

... If this attitude affects your compliance with Company policy and procedures, ...

Bruno Fraeyman

APPENDIX H - EXCERPTS FROM PLAINTIFF'S EXHIBIT NO. 27

Department of Health and Human Services
Public Health Service
Food and Drug Administration

4/24/90

1. There are no written procedures for production and process control. The lack of written procedures and records was determined by asking Mr. Robert W. Ferguson for the procedures or records and he replied that there were none that he could find.

2. A review of the firm's analytical records revealed that some oxygen and nitrogen analytical records do not have the initials or signature showing that the original records have been reviewed for accuracy and/or completeness by a second person.

... He stated that he would contact corporate headquarters the following day to obtain written procedures for production and process control.

APPENDIX I - EXCERPTS FROM TRIAL TESTIMONY OF BRUNO FRAEYMAN PAGE 313 LINE 2

Q. Let me show you what has been marked as Exhibit 26. Can you identify Exhibit Number 26, please?

A. Yes. It's a written warning letter.

Q. And this is about an FDA form?

A. Yes.

Q. It appears that you're blaming Mr. Ilic for a lack of procedures at the plant; is that right?

A. Yes, that's right.

APPENDIX J - EXCERPTS FROM TRIAL TRANSCRIPT PAGE 752 LINE 22

THE COURT: ... In sum then, on a failure to promote: I find that as a matter of fact, although there is evidence from which a finder of fact could find a prima facie case to have been established, I find that the Plaintiff has not proven facts that satisfy the, in weighing all the evidence, the prima facie case for promotion.

APPENDIX K - EXCERPTS FROM TRIAL TRANSCRIPT PAGE 678 LINE 14

On June 27, 1991, Ilic received letter of termination. Testimony of area manager Ernie Smith state: "Q. So you didn't attempt to determine whether the facts, what have been alleged to be the facts by Mr. Thompson was true? A. If by talking to Mr. Ilic, no. Q. So you solely relied on Mr. Thompson? A. Yes.", also: "Q. The termination? A. Yes, solely was Charles. Q. No witnesses? A. No witnesses."

APPENDIX L - EXCERPTS FROM TRIAL TRANSCRIPT PAGE 559 LINE 7

Testimony of Barry Lucht state: "Q. Did you consider Zarko Ilic headed for promotion to that plant? A. No, I did not. Q. Could you tell us why? A. Nobody ever called to say he wanted it." Barry Lucht was an area manager in the Orlando plant.

[1] Because Plaintiff's financial condition controls the amount to be awarded, it is unnecessary for the Court to conduct a detailed analysis of Defendant's supporting documentation. Even if vast amounts were eliminated from the claim for some reason, the resulting fee would still exceed Plaintiff's ability to pay. As noted above, Plaintiff raised no specific objections.